33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 448

THE NIAGARA FALLS POWER COMPANY

v.

FEDERAL POWER COMMISSION.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

Dated: December 1, 1943

JOSEPH M. PROSKAUER,
RANDALL J. LEBOEUF, JR.,
WARREN TUBBS,
LAUMAN MARTIN,
J. ALVIN VAN BERGH,
Counsel for Petitioner,
The Niagara Falls Power Company,
15 Broad Street,
New York 5, New York.

LEBOEUF & LAMB,
Of Counsel.

Table of Cases

Statutes

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

THE NIAGARA FALLS POWER COMPANY, *Petitioner,* *against* FEDERAL POWER COMMISSION.	No. 448.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

Petitioner, The Niagara Falls Power Company, respectfully prays this court to reconsider the order made on November 22, 1943, denying its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. In support thereof petitioner respectfully submits:[1]

I

This case turns on whether the present members of the Federal Power Commission may in 1942 repudiate[2] the action of predecessor members in 1921 in issuing to petitioner a license under the Federal Water Power Act—

1. Reference is respectfully made to the petition filed October 22, 1943, for any necessary amplification of the subject matter other than that discussed herein. Sections 23, 6, 26 and 28 of the Federal Water Power Act are printed as Appendix A. The "fair value" provision in petitioner's license is Appendix B.

2. And incidentally overrule *sub silentio* its formal holding that it "* * * regards as *res adjudicata* those questions which were necessarily determined by a predecessor Commission at the time of the issuance of the original license." *In the Matter of Columbia Railway & Navigation Company, Licensee,* 1 F.P.C. 78, 86 (1933).

where Congress did not provide a method of review of the original Commission's action[3]—where the act of issuing a license was complete in and of itself and not subject to continuing authority as to issuance or the provisions to be included therein[4]—where the issuance of the license required the exercise of broad and comprehensive functions[5] and necessarily required an interpretation of the law.[6]

The present Commission, with the approval of the court below, has rejected the "fair value" provision in petitioner's license and substituted in lieu thereof a provision that petitioner's net investment shall be determined on the basis of "cost".

On the authority of *Butte, Anaconda & Pacific Railway Co.* v. *United States*, 290 U. S. 127,[7] we respectfully submit that the present Commission has no such power, that the court below in upholding the present Commission's action in repudiating a license provision and substituting another has decided an important Federal question in utter conflict with the decision of this court.

In the *Butte* case the United States sued to recover moneys paid by the Treasurer of the United States to the railway on a certificate of the Interstate Commerce Commission under §204 of the Transportation Act, 1920, 41

3. *Butte, Anaconda & Pacific Ry. Co.* v. *U. S.*, 290 U. S. 127, 136, 142-143.

4. The license, so the Commission in its First Annual Report advised the Congress, "is a contract between the Government and the licensee [petitioner], expressly contains all the conditions which the licensee must fulfill, and except for breach of conditions, can not be altered during its term either by the Executive or by Congress without consent of the licensee" (R.V., 2860, Ex. 135). The brief in opposition to the writ erroneously analogizes our case to administrative authority in its nature continuing (p. 18).

5. *Butte, Anaconda & Pacific Ry. Co.* v. *U. S., supra*, 136, 142.

6. *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48.

7. This case was not directed to the attention of the court on the original application.

Stat. 460, Reimbursement of Deficits During Federal Control. From the court's opinion it appears:

> "* * * Upon due hearing, the Commission concluded that the Railway was entitled to $487,116.31; and it offered to issue a certificate[8] for that amount on condition that the Railway sign a release accepting the amount 'in settlement of all claims against the Government under said Section 204'. *This condition was agreed to.* About two years after the money received had been disbursed by the Railway, partly in dividends to stockholders, partly in the expenses of operation, the Commission issued an order purporting to reopen the proceeding; and set a hearing 'for the purpose of affording the Railway opportunity to show cause why the certificate * * *, should not be revoked and its claim dismissed.'[9] The Railway, appearing specially, protested against the action of the Commission in attempting to reopen the proceeding; and challenged its power to do so.[10] * * * the Commission entered an order purporting to cancel the certificate[11] * * *. * * * the Under-Secretary of the Treasury demanded of the Railway repayment of the $487,116.31 received by it. Repayment was refused. Fourteen months later, this action was begun to recover the money." (p. 133). (Italics supplied.)

Eventually the United States recovered judgment in the District Court and the Circuit Court of Appeals affirmed. The opinion then goes on:

---

8. Note the analogy to our case—petitioner's license is a certificate whereby the Government has an irrevocable option to buy petitioner's property at a fixed price—net investment based on "fair value" as to the project property constructed by March 2, 1921.

9. Compare the Commission order herein (R. V, 2889).

10. Compare R. I, 52, 54-56, 74.

11. Compare the Commission's opinion herein (R. V, 2909) and order (R. V, 2891-2895).

"* * * The charge is that the money was paid, because, in 1925, the officials misconstrued the word 'deficit', so as improperly to extend the scope of §204. That is a charge, not of mistake but of error of judgment—a judgment necessarily exercised in the performance of the duties of office. Neither the Commission in issuing the certificate, nor the Secretary of the Treasury, the Comptroller General or the Treasurer when co-operating to make the payment, labored under any mistake of fact; or overlooked any applicable rule of law; or was guilty of any irregularity in proceeding"[12] (p. 134).

"* * * The rule there announced was consistently acted upon for over two years and a half[13]. * * * Then there was a change in the membership of the Commission. * * * it overruled * * * its earlier decision; and * * * instituted against Butte, Anaconda & Pacific Railway Company the proceeding to revoke the certificate on which payment had already been made. Obviously, 'Mistake * * * there was none, but merely a revision of judgment in respect of matters of opinion.' *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 151."

---

12. The same is true in our case. There is no disagreement on the facts—the case involves the right of the Commission to apply retroactively its own interpretation of the law to a license—signed, sealed, executed, authorized, delivered and accepted in accordance with law twenty-two years ago.

13. Our record abounds with evidence that the Commission for a period of more than seventeen years recognized the validity of petitioner's license (R. V, 2844, Ex. 128, 2845-2850, Ex. 129, 2854, Ex. 132, 2856-2857, Ex. 133, 2867-2868, Exs. 141-144, 2869-2870, Ex. 145, 2871-2872, Ex. 146). The brief in opposition improperly conveys the impression that the Commission at least by inference repudiated the "fair value" provision of petitioner's license long before 1942 (pp. 10, 18). A direct refutation of this inference is that after the 1927 opinion in another situation was approved and the 1930 opinion of the Solicitor directed to petitioner's project was released, the Commission formally recorded in its published minutes that in 1931 petitioner agreed to make available to Commission examiners certain predecessor company records and the Commission announced, "This procedure contemplates an early determination of *fair value* by mutual agreement as provided in the Act, * * *" (R. V 2869-2870, Ex. 145). Moreover in 1932 in a formal pleading the Commission averred petitioner's license was "duly issued" (R. V, 2872, Ex. 146). As late as 1937 the Commission requested *appraisal* data for "Determination of *Fair Value* as of March 2, 1921" (R. V, 2856).

"* * * The argument is that the Commission had no authority to issue a certificate * * *; and that, having received the money which the officials were not authorized to pay, the Railway must restore it, since in dealings with the Government one is bound, at his peril, to know the limits of the authority of its agents. *We have no occasion to determine which of the Commission's interpretations of the word 'deficit' is the correct one.*[14] For we are of opinion that the Government cannot recover the money paid in 1925, *even if the Commission erred in attributing to the word 'deficit' the meaning then acted on.*" (Italics supplied.)

"* * * The case is no different than it would have been, if the Commission had erred in any other ruling on a matter of law; * * *. In making those decisions the Commission would necessarily act in a quasi-judicial capacity. If it misconstrued the term 'deficit' it committed an error; but *it did not transcend its jurisdiction.*[15] *Since Congress has not provided a method of review,*[16] neither the Commission nor a court has power to correct the alleged error after payment made pursuant to a certificate. * * * To appreciate the broad scope of the Commission's duty, we must consider the

14. Compare from the court below in our case "* * * it is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions." (R. VI, 3121).

15. In our case the Federal Power Commission, on March 2, 1921, did not transcend its jurisdiction—it issued to petitioner a license. This action was within the purview of authority vested in it under the Federal Water Power Act. The brief in opposition (pp. 17-18) and the Commission's opinion (R. V, 2008) erroneously attribute to the original Commission an "unauthorized" and hence a "void" act in issuing to petitioner the license with the "fair value" provision under Section 23. The original Commission made all the findings requisite to a Section 23 "fair value" license, namely, that petitioner had a constructed project and on June 10, 1920 a permit, right-of-way and authority (R. IV, 1988). *Arguendo* the Commission may have erred on a matter of judgment in interpreting the law but it did not do a void act. Hence *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Wilber National Bank* v. *United States*, 294 U. S. 120; and *United States* v. *San Francisco*, 310 U. S. 16, do not apply.

16. The Federal Water Power Act did not provide a method of review in respect of a license issued to and accepted by an applicant.

occasion and character of the legislation and the precise question of construction here involved." (pp. 135-136) (Italics supplied.)

"Under §204, the Commission exercises functions broader than those customarily conferred upon auditing or disbursing officers. It sits as a special tribunal to hear and determine the claims presented.[17] * * * It renders a judgment upon a full hearing. In deciding any one of the enumerated questions of construction, as in other rulings of law or findings of fact, *the Commission may err.*[18] The victim of the error may be either the carrier or the Government. * * * An erroneous decision in favor of the carrier, on any of those questions, may result in the issue of a certificate and the payment thereunder of money which should not, and but for the error would not, be made. *Since authority to pass* upon the meaning of the word 'deficit', and *upon each of the other questions of construction, is*

---

17. Mr. Justice Brandeis points out (pp. 139-141) that the Interstate Commerce Commission in passing on claims under §204 had to decide many questions of statutory construction—listing ten.

In granting a license under the Federal Water Power Act or the Federal Power Act, the Federal Power Commission too "sits as a special tribunal to hear and determine the claims presented" (p. 142). Our license was issued as against nine rival applications after public hearing. Likewise, "In making its determinations the Commission was required to decide many things * * *" (p. 136). For example, in our case is the project "such as in the judgment of the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water power development, and for other beneficial uses, * * *" (Section 10). Has the applicant submitted "* * * satisfactory evidence that the applicant has complied with the requirements of the laws of the State * * * with respect to bed and banks and to the * * * diversion, and use of water for power purposes * * *?" (Section 9). Does the applicant qualify for a preference under Section 7? And, as in the case of petitioner, does applicant qualify for a "fair value" license under Section 23 or only a "cost" license under Section 4?

18. Compare the statement of the court below—"The petitioner is right in saying that the Commission at that time supposed the case fell within the proviso of §23(a), and meant to issue a license 'for a project already constructed' under a 'permit * * * heretofore granted'. But in that the Commission was mistaken" (R. VI, 3119).

Compare also the statements from the brief in opposition to the writ (p. 19) "* * * from the Commission's correction of the original error."—"If the Commission had made no original error, * * *"—(p. 18) "Nor does the Commission's delay in correcting its error * * *" (p. 17)—"* * * to hold the Commission bound by its original error of law * * *".

> *essential to the performance of the duty imposed upon the Commission, and Congress did not provide a method of review, we hold that it intended to leave the Government, as well as the carrier, remediless whether the error be one of fact or of law''* (pp. 142-143). (Italics supplied.)

This court accordingly reversed the Circuit Court and held in favor of the petitioner railway.

We labor the *Butte* case because it so precisely indicates the need for review in the case at bar.

Arguendo, in our case the original Commission may have erred in interpreting Section 23 to permit issuance of the "fair value" license to petitioner thereunder. We may surmise it construed its authority under Section 23 to permit issuance of a license with the now disputed "fair value" provision to any applicant having a constructed project and having on the effective date of the Act a permit to divert water. Such a construction was at least a possible one. If so, petitioner duly qualified for the "fair value" license and findings in the license so recite. In any event, the original Commission performed an act for which it had statutory authority—it issued the license. As in the *Butte* case, the original Commission had "authority to pass on the meaning of the words" [permit, right of way, or authority as used in Section 23], "and upon each of the questions of construction," since it was "essential to the duty imposed upon the Commission and Congress did not provide a review * * *."

We earnestly submit to this Court that petitioner's situation parallels that of the railway in the *Butte* case and that our case should be reviewed. The Court below in effect has overruled the *Butte* case.

Compare also from *Ness* v. *Fisher,* 223 U. S. 683, 691, a mandamus case:

> "The Secretary's decision, * * * was not arbitrary or capricious, but was based upon a construction of §2 which was at least a possible one, * * *. True, a different construction had been adopted * * * and has since been followed * * * but this, instead of indicating that the Secretary's decision was arbitrary or capricious, illustrates that there was room for difference of opinion as to the true construction of the section, * * *".

We submit that in the instant case of petitioner the unwarranted usurpation of power by an administrative agency should be reviewed by the court to preserve the integrity of proper administrative regulation.

II

The brief in opposition to the granting of the writ conveys the impression that the Commission's orders sought to be reviewed are a simple correction of original error (pp. 17, 18, 19). That is not the fact. What the present members of the Commission have done is to arrogate unto themselves the power to make a new interpretation of the law—Section 23—contrary to that reasonably, and we urge, correctly, entertained by the first members[19] of the Commission and retroactively to apply that interpretation as

---

19. Messrs. Newton D. Baker, John Barton Payne and Edwin D. Meredith, as Secretaries of War, Interior and Agriculture, constituted the first Commission whose act in issuing petitioner's license is now undone. Messrs. Baker and Payne were active in the practice of the law and members of the bar of this Court. Secretary Baker, particularly, in the language of the court below, had "a long acquaintance * * * with the subject matter * * * in office and before" (R. VI, 3121). Secretary Baker issued the permits under the Joint Resolutions (R. V, 2709, 2744, 2745) and a legal opinion on the diversionary rights of petitioner's predecessors (R. V, 2834-2839), urged upon the Governor of New York approval of the 1918 legislation forming petitioner (R. V, 2736-2741), and encouraged a constituent of petitioner in 1918 to make a substantial expenditure to enlarge the project upon the Secretary's assurance that he would recommend "suitable federal legislation * * * to include provisions authorizing the issue of long term licenses upon conditions believed to be fair, just and satisfactory" (R. V, 2735).

though the present members of the Commission were substituting themselves for the original members in the initial issuance to petitioner of the March 2, 1921 license.

What the present Commission by its own administrative edict and in violation of the Act has done is to

1. Revoke the "fair value" provision of petitioner's license;

2. Substitute *in invitum* a "cost" provision of its own;

3. Apply that substitute provision, and

4. Effect a confiscation of petitioner's property.

If revocation, modification, amendment or alteration of any of the terms of petitioner's license is required, Congress has laid down adequate procedural provision therefor (Sections 6, 26).

This case should be reviewed because an important question of federal administrative procedure is involved—under what statutory mandate did the Commission issue its orders sought to be reviewed?

III

It is significant that the brief for the Federal Power Commission in opposition to the granting of the writ sought herein contains not a word about our representation that the license in question is a contract (R. Vol. V, 2860, Ex. 135) the terms of which even the United States as a contracting party must respect. In a footnote to page 19 of the brief in opposition it is merely claimed that "Section 28 of the Act providing against legislative amendment or repeal of the terms of any license is of no help to petitioner. There has been no such amendment

or repeal. Moreover the protection to be accorded can reasonably apply only to valid provisions of licenses."

If the substitution of a Section 4 "cost" requirement for the determination of net investment in lieu of a Section 23 "fair value" provision in a license is not amendment or repeal, what can it be? The mere fact that such amendment in this case has been effected by a delegatee of legislative power instead of by the direct action of Congress does not render the saving clause of Section 28 of the Act any the less applicable to petitioner's license.

The suggestion that the saving clause of Section 28 applies only to valid provisions of licenses in effect puts every licensee under the Federal Power Act on notice that provisions of their respective licenses are valid not upon their due issuance by the Federal Power Commission but only after court determination in the event that the same or successor members of the Commission elect to repudiate some provisions.[20]

In the case of the license issued to this petitioner, petitioner is in the hapless position of not knowing now what may eventually be its rights and obligations in respect of any of the considerable number of provisions of its license contract of March 2, 1921. The license is for a term of fifty years. Is petitioner to anticipate that some other one or more of the provisions of the March 2, 1921 license will be modified, eradicated or repudiated by the present or future members constituting the Federal Power Commission? It appears even possible that some future commission may reconsider the very "fair value" provision the repudiation of which has resulted in the present petition to this court. The court below has merely affirmed

20. Compare the argument addressed to this Court by the petitioner in the *Butte* case—"If the position of the Government is sound in this case, each succeeding Commission may make and revoke certificates and treat petitioner's claim as constantly before it." (p. 130).

as modified the orders of the Commission. There is no mandate to stop the Commission from re-examining again the disputed provision or any other provision of the license unless this court will grant review to the petitioner and permit petitioner to establish the validity of its license as written and executed more than twenty-two years ago. The decision of the court below sought here to be reviewed is an open sesame to the present members of the Commission to undo the work of their predecessors at the pain only of possible reversal by the courts. The decision below has thrown in jeopardy every license issued by the Federal Power Commission. These broad implications of the decision below call for its review by this court.

IV

This court, by order made on October 11, 1943, consented to review *Northwestern Electric Company and another* v. *Federal Power Commission*, No. 195, October Term, 1943. From the petition for the writ in the *Northwestern* case it appears that the same Federal Power Commission acting in that case under Part II of the Federal Power Act, in exercising jurisdiction over a public utility, has made an order requiring the Northwestern Company to adjust its books in a manner alleged to be patently inconsistent with applicable law with the resulting confiscation of that petitioner's property. If this court considers the *Northwestern* case to require review we submit that our case—where petitioner's property is confiscated by an exercise of power where no commission or court cites any authority therefor—is likewise entitled to review.

V

When petitioner applied for and accepted a license from the Federal Power Commission issued March 2, 1921, petitioner's securities were listed on the New York Stock Exchange and were highly rated (R. IV, 1981-1983).

Another generation of investors now owns petitioner's stock through the medium of investments in securities of Buffalo, Niagara & Eastern Power Corporation, a holding company owning all petitioner's outstanding stock.

The action of the Federal Power Commission visits upon the holders of Buffalo, Niagara & Eastern Power Corporation securities a substantial loss simply because the present members of the Federal Power Commission have elected to qualify for their office as of March 2, 1921 and thereupon to abrogate the action taken by the then duly constituted Commission.

The surplus deficit to petitioner is approximately twelve million dollars as a result of the Commission's orders.

This retroactive repudiation by the United States of a provision of petitioner's license contract is grounded not on any charge of fraud, concealment, misrepresentation or the like. If that were the case correction of the alleged original error might conceivably be understandable and the denial of the writ sought herein from this Court would not come to petitioner's executives and its counsel as such a shock. But the fact is the repudiation of the "fair value" provision is grounded merely on a reinterpretation of Section 23 of the Federal Water Power Act retroactively applied by successors in office in a continuing administrative agency.

The administrative authority in respect of the granting of the license and of the specific provisions to be included

therein ceased and determined on March 2, 1921 when petitioner duly accepted the license tendered to it in strict compliance with the applicable requirements of the Federal Water Power Act. The administrative authority in respect of the granting of the license was plainly not in its nature continuing.

There remained in fact after March 2, 1921, only a continuing jurisdiction of petitioner to secure compliance with and performance of the license terms.

We submit that no authority is cited for the Commission to reverse itself on the initial question of the issuance of the license contract.

We further submit that the evidence of this record amply supports petitioner's position that the license under Section 23 with the fair value provision was correctly initially issued.

In a matter having the serious and far-reaching implications of the case at bar where a novel doctrine of administrative power arbitrarily to override action of a predecessor commission is asserted the Court should review the case.

VI

We respectfully pray this Court to reconsider its order made November 22, 1943, denying the petition for a writ of certiorari, grant a rehearing to petitioner, upon rehearing to vacate the order and grant the writ herein prayed.

Dated: December 1, 1943.

Respectfully submitted,

JOSEPH M. PROSKAUER,
RANDALL J. LEBOEUF, JR.,
WARREN TUBBS,
LAUMAN MARTIN,
J. ALVIN VAN BERGH,
Counsel for Petitioner,
The Niagara Falls Power Company,
15 Broad Street,
New York, New York.

LEBOEUF & LAMB,
Of Counsel.

Certificate of Counsel

I hereby certify that this petition for reconsideration is presented in good faith and not for delay.

JOSEPH M. PROSKAUER